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Hamdani v INS 02-71250

BERZON, J., dissenting:

CATHY A. CATTERSON

U.S. COURT OF APPEALS

I respectfully dissent. I would hold that on this record, petitioners established eligibility for asylum from the United Kingdom. Although the officials in the United Kingdom were apparently willing – to some degree – to protect the Hamdanis from persecution, they were not able to do so.

This court has held repeatedly that an asylum claim may be based on a government's inability to control persecution by non-government forces. *See, e.g., Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000); *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000). This court has reversed denials of asylum in several cases in which the government was not indifferent to, but was unable to stop, the persecution experienced by the asylum petitioner. *See Avetova-Elisseva*, 213 F.3d at 1198 (financially constrained Russian government grappling with high crime rate was unable to control anti-Armenian violence by private actors); *Gomez-Saballos v. INS*, 79 F.3d 912, 916-17 (9th Cir. 1996) (Nicaraguan government was unable to control former National Guard members who threatened life of government appointee); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc) (viable asylum claim where persecutor was “a member of the Armed Force, a military power that exercises domination over much of El Salvador despite the

staunchest efforts of the Duarte government to retrain it.”); *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981), *superseded on other grounds by statute* (asylum claim could be stated for persecution by Irish terrorist organization).

Mr. Hamdani’s testimony, along with numerous articles in the record, reveals the magnitude of the problem of sentiment against South Asian immigrants in the United Kingdom. The murder of Mr. Hamdani’s nephew was no isolated event. The thousands-strong demonstrations in which the Hamdanis participated protested not only their nephew’s death but the race-based murder of a young black man that had taken place a few months before in the London area. A newspaper article reported that the British Nationalist Party set up headquarters in South London, resulting in increased attacks in the area. A Muslim shopkeeper was brutally beaten, and Sikh and Hindu places of worship were firebombed. Within a few months of the murder of Mr. Hamdani’s nephew, an Asian youth and an Asian taxi driver were killed for racial reasons in the same area. Mr. Hamdani testified that “you will see a lot of cases [of racist attacks like those on his nephew], without anybody be [sic] prosecuted.”

The Hamdanis’ asylum claim, however, is based on persecution of them, not of others. Years before his nephew’s murder, Mr. Hamdani was accosted in the subway by nationalists and told to get out the country immediately. In another

incident predating his nephew's murder, he was physically attacked while riding the subway. Mr. Hamdani stated that he did not report the physical attack to police: "[A] lot of people, they were telling me 'You have to be careful.' And if you report something, if you get caught, then you are ask for trouble, they come back for revenge."

After their nephew's murder, Mr. and Mrs. Hamdani participated in anti-racism activism and were quoted in newspaper articles discussing race-based violence in London. Mr. and Mrs. Hamdani and their son Ali were photographed as participants in anti-racist demonstrations.. Their outspokenness made them visible targets. Someone broke into the Hamdani home and left a threatening note in language similar to that used by the Nationalists : "'You Pakis, you better leave Britain, it's not your home.'" "Skinheads" visited Mr. Hamdani's business several times in search of him; Mr. Hamdani was so frightened that he transferred the business to his friend and stopped going to work. The Hamdani children were harassed at school to such an extent that their parents felt it necessary to remove them from school. Apparently, although they did try, the police were unable to apprehend most of the perpetrators of various threats, harassment, and property destruction directed at the Hamdanis. *Cf. Avetova-Elisseva*, 213 F.3d at 1198 ("It does not matter that financial considerations may account for such an inability to

stop elements of ethnic persecution. What matters instead is that the government is unwilling or *unable* to control those elements of its society committing the acts of persecution.” (emphasis in original) (internal quotations and citation omitted)).

The net result of the threats and harassment was that the Hamdanis lost the ability to work, send their children to school, and live safely in the United Kingdom because the British government, despite its good-faith efforts, was simply unable to protect them. The Hamdanis did investigate moving elsewhere in the United Kingdom but were advised that matters were more difficult for South Asians outside London than in the city. To recognize in these unique circumstances the need for asylum from the United Kingdom does not open the floodgates to recognition of asylum claims from that country. I would therefore find that the denial of asylum from the United Kingdom to the Hamdanis is not based on substantial evidence, and would grant the petition.